IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE THIRTIETH DAY OF AUGUST
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE G.CHANDRAIAH

WRIT PETITION NO : 1581 of 1993

Between:

D. Venkateswarlu S/o. Kannaiah Chetty
R/o. 5/127 Stone Housepet, Nellore.

..... PETITIONER

AND

1 The Engineer-in-Chief Public Health, AC Guards Hyderabad.
2 The Superintending Engineer CERP (PH) Gandhinagar, Vijayawada.

.....RESPONDENTS

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

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W.P.NO.1581 OF 1993

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O R D E R

Heard both the counsel.

2. This writ petition is filed for a writ of Mandamus declaring the proceedings of the 1st respondent - Engineer-in-Chief, Public Health, in letter No.316290/WB/LC/T/91 dated 26.9.1992 forfeiting the security amount as illegal and arbitrary and consequently direct the respondents to release the amount of Rs.83,000/- to the petitioner.

3. The case of the petitioner in the affidavit filed in support of the writ petition is that pursuant to the tender notification dated 17.6.1992 issued for construction of roads and drains, package no.154, Gudur Municipality, the petitioner submitted his tender and as he was the lowest bidder, his tender was accepted by 1st respondent through letter no.316790/WB/IC/T/92 dated 1.9.1992 and was requested to furnish construction program; financial trustworthiness certification from bank for Rs.17,00,000/-; etc, within thirty days. The said letter was received by the petitioner on 17.9.1992. As he suffered jaundice from 10.8.1992 to 30.8.1992 and as he was advised rest for six months, through representation dated 16.9.1992, he sought extension of time for completion of work upto 1.7.1993, enclosing the doctor's certificate. Through letter No.154/CERP/PH/DB/92 dated 17.9.1992 addressed by 2nd respondent to the petitioner, he was requested to furnish the construction program, performance certificate etc. within 30 days. The said letter was received by the petitioner on 25.9.1992. Though the petitioner was suffering from jaundice, he has taken steps to furnish the required performance security etc. But by the

impugned letter dated 26.9.1992, treating the request of the petitioner for extension of time as withdrawal of bid, the 1st respondent cancelled the work order dated 1.9.1992 and forfeited the bid amount. Aggrieved by the forfeiture of security amount, the present writ petition is filed.

4. The 2nd respondent – Superintending Engineer filed a detailed counter affidavit denying the writ averments. Along with the counter, the representation of the petitioner dated 16.9.1992 is also enclosed. In the counter it is stated that the writ petition is not maintainable in contractual obligations. During May, 1990 cyclone, roads, drains and water supply were damaged and with the aid of world bank, restoration works were taken up and it is time a bound project, which has to be completed by 31.12.1993. After the petitioner's bid was accepted, through letters dated 1.9.1992 and 17.9.1992, the petitioner was requested to furnish construction program, financial trust worthiness certificate etc within 30 days. But the petitioner did not furnish the same and sought for extension of time. It is stated that there is no provision for extension of time. In the counter affidavit, the dates with regard to receipt of different letters by the petitioner is also disputed. It is stated that extension of time amounts to modification of accepted conditions within bid validity period of 19.10.1992, which attracts 14.6(2) Sectio-I, Vol. I of bid document which says if a bidder withdraws or modifies his bid during the period of validity bid, security may be forfeited. It is further stated that the order of the 1st respondent dated 26.9.1992 canceling the order issued on 1.9.1992, duly forfeiting the bid security was also received by the petitioner on 10.10.1992 and had the petitioner was really work conscious, he could have objected then and produced the information called for by the 1st and 2nd respondents through letters dated 1.9.1992 and 17.9.1992 and entered into agreement and started the work. Contrary to this the petitioner waited till the expiry of validity period of 19.19.1992, till the other contractor entered into an agreement and started the work and then he approached the court to get back his bid security with mala fide intention that too after lapse of four moths from the date of receipt of the cancellation order. Even after receipt of the cancellation order, had he approached the authority immediately before entrusting the work to the other contractor, stating that he is ready to fulfill all the requirements as stated above, he would have got the work again. With these averments, the respondents sought for dismissal of the writ petition.

5. The learned counsel appearing for the petitioner submitted that the petitioner was the successful bidder and through his representation dated 16.9.1992 he sought only for extension of time, as he was suffering from jaundice and this cannot be treated as a letter seeking withdrawal of bid and this also does not amount to modification of bid document. As per the letters of the respondents dated 1.9.1992 and 17.9.1992, time was granted for 30 days for fulfilling the requirements and even before the expiry of the said period, the impugned order was passed on 26.9.1992 canceling the work order and the same is illegal and the action of the respondents is contrary to clause 14.6 of Section I of bid document. He stated that the Government has entrusted the work to another contractor and as such it has incurred no loss. He further contended that since the petitioner only sought for extension and if the same was not agreeable, respondents ought to have rejected the request of the petitioner and the petitioner would have commenced the work by furnishing the required documents. He contended that for no fault of the petitioner, the work order was cancelled and, therefore, he is entitled for the refund of the security amount. In support of his contention, he relied on the judgment of a Division Bench of this Court in ***KRISHNA & COMPANY v. GOVT. OF A.P.***.

6. On the other hand, the learned Government Pleader for Irrigation appearing for respondents submitted that after the bid was accepted, the petitioner was requested to comply with the formalities within 30 days, but he did not comply with the same and instead sought for extension through letter dated 16.9.1992 on the ground that he suffered from jaundice and that doctor advised rest and that he require three months for securing financial resources. He contended that there is no provision in bid document for extension of time once the tender is accepted and decided and this amounts to modification and the same is not permissible under clause 14(6) Section 1 of bid document. He stated that the project, which is with the aid of work bank, is time bound and as per the policy of the Government, it has to be completed by 31.12.1993 and therefore, extension of time is not possible and as the petitioner did not furnish the construction program, financial trustworthiness certificate etc., as per the conditions of tender, the security amount is forfeited. Finally he contended that for enforcing the contractual obligations, writ petition is not maintainable and the petitioner has to work out his remedies in civil court. In support of his contention, he relied on a Division Bench judgment of this court in ***APSRTC, HYD. V. SRI ADITYA MASS COMMUNICATIONS PVT. LTD, SOMAJIGUDA*** .

7. From the above facts and circumstances and rival contentions, it is not in dispute that the petitioner was the successful bidder and the 1st respondent through letter dated 1.9.1992, which was alleged to have been received by the petitioner on 17.9.1992, asked the petitioner to furnish the construction program and financial trustworthiness certificate. But on 16.9.1992 itself, i.e., one day prior to receipt of letter, the petitioner made a representation for extension of time for execution of work. Along with the counter, the respondents have produced the representation of the petitioner. A perusal of the said representation reveals that the petitioner stated that pursuant to submission of tender, he did not receive any further information; that he suffered from jaundice and; that he was advised to take rest for six months. He further stated that to secure financial resources, he require three months time and, therefore, for starting the work he require time upto 1.7.1993 and that in case it if is not possible for extension, EMD amount may be returned. From this letter, the stand of the petitioner is self-contradictory. On the one hand, he states that after submission of tenders, he has not received any information and that he suffered jaundice and was advised rest; on the other hand, he seeks time of three months up to 1.7.1993 to start the work and for securing financial resources. However, the petitioner did not disclose this fact in this writ affidavit. Further the petitioner has not brought to the notice of this court any provision, which enables him to seek for any extension of time for commencement of work, after acceptance of tender. The respondents in their counter affidavit stated that the project works were undertaken with the aid of world bank and has to be completed by 31.12.1993. The respondents in their counter affidavit also disputed with regard to receipt of different letters by the petitioner.

8. A perusal of the impugned order discloses that request of the petitioner for extension of time up to 1.7.1993 for starting the work was not accepted as the project is time bound and was to be completed by 31.12.1993 and therefore, treating the request of the petitioner as withdrawal, the security amount was forfeited. However, subsequent to this forfeiture, the petitioner did not make any representation showing his willingness or at least complied with the required formalities and after canceling the bid and entrusting the work to other contractor, filed this writ petition. The respondents in their counter affidavit at paragraph no.7 stated that *“had the petitioner is really work conscious, he could have objected then and produced the information called for by the 1st respondent and 2nd respondent through Lr. Dt. 1.9.92 and*

17.9.92 and enter into agreement and started the work. Contrary to this the petitioner waited till the expiry of validity period of 19.10.92, till the other contractor entered into an agreement and started the work. Then he approached the court to get back his bid security with mala fide intention that too after lapse of four months". On the other hand, the case of the petitioner is that though he suffered from jaundice, he has taken steps to comply with the required formalities, but the respondents have cancelled the work order even before the expiry of 30 days period granted by the respondents and the is the same is illegal and arbitrary.

9. In view of the above disputed facts and circumstances, this court cannot give a finding under the writ jurisdiction without there being any evidence and required material that the request of the petitioner for extension of time amounts to withdrawal of bid and that there is no fault on the part of the petitioner. The questions can be decided only in a comprehensive adjudication in the light of the both oral and documentary evidence, that is to be adduced by either party.

10. The judgment relied on by the counsel for the petitioner in ***KIRSHNA & COMPANY v. GOVT. OF A.P.*** (1 supra), disclose that the facts therein are not in dispute and the frustration of contract works was at the instance of the Government. Therefore, this court held that as there are no disputed questions arising for determination of refund of amount deposited by the petitioner therein , the amount can be refunded. But in the present case, the petitioner could not start the work, as he required time for securing financial resources and that he suffered from jaundice and was advised rest. The respondents have disputed these facts. In the present case there are many disputed questions. Therefore, though the decision of the Division Bench is unexceptionable, is not applicable to the facts of the present case.

11. In the present case, as already noted above, the petitioner is claiming return of security amount deposited by him, under a contractual obligation. The later Division Bench of this Court in ***APSRTC, HYD. V. SRI ADITYA MASS COMMUNICATIONS PVT. LTD., SOMAJIGUDA*** (2 supra), considering various decisions of this court and also Apex Court held that writ petition filed challenging the order of forfeiting earnest money deposit made along with a tender submitted by the petitioner and seeking repayment of the same, cannot be entertained under Article 226 of the Constitution of India and the petitioner has to approach the civil court or seek his remedy in

arbitration proceedings in case there is an arbitration clause in the contract. The relevant portion at paragraph no.5 of the judgment is extracted as under for better appreciation:

> "…It is a case, in our view, in which the petitioner-respondent's claims have to be adjudicated on the basis of the pleadings of the parties to decide whether there was indeed withdrawal of the tender by the petitioner-respondent or was he in accordance with the tender schedule, the highest bidder who backed out and thus earned the forfeiture of the earnest money deposit. The above, in our view, is an issue, which has to be decided on the basis of the materials and the evidence that the parties may possesses, and any decision summarily reached on such issue of far reaching consequence, without proper opportunity to the parties to lead such evidence, which they may think fit and proper and in a proper and regular civil suit or if there is any arbitration agreement, without asking the party to got arbitration in the event of their being so pleased will not be proper."

12. In view of the above facts and circumstances, the writ petition is devoid of any merits and the same is liable to be dismissed and accordingly dismissed.

13. However, it is needless to mention that it is always open for the petitioner to approach a competent civil court and work out his remedies.

AVS ----------

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